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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas, Secretary  
Federal Communications Commission  
1919 M Street, N.W., Room 222  
Washington, D.C. 20554

Re: Ex Parte -- AT&T Opposition to Petition for Reconsideration  
of SBC Communications, Inc., In the Matter of Tariffs  
Implementing Access Charge Reform, CC Docket No. 97-250  
(filed July 1, 1998).

Dear Ms. Salas:

AT&T Corp. ("AT&T") hereby files this ex parte letter in opposition to the July 1, 1998 Petition for Reconsideration submitted by SBC Communications, Inc. ("SBC") in the above-captioned proceeding.<sup>1</sup> As described below, the Commission's June 1, 1998 Memorandum Opinion & Order ("June 1 Order")<sup>2</sup> properly determined that SBC's definition of non-primary lines was unreasonable, and correctly rejected Pacific Bell's application of that definition. SBC's Petition for Reconsideration therefore should be denied.

SBC principally argues that it is entitled to reconsideration because, in the June 1 Order, the Commission "improperly promulgated a new definition of non-primary lines" and unlawfully gave this "ruling" "retroactive effect." Pet. at 2-4. SBC's argument is ill-conceived. First, in the June 1 Order, the Commission did not promulgate a new definition of non-primary lines. SBC concedes as much when it states that "the Commission has not yet formally defined that term" and that SBC "assumes that the eventual definition of 'non-primary' line will be similar to that

<sup>1</sup>Petition for Reconsideration of SBC Communications, Inc., In the Matter of Tariffs Implementing Access Charge Reform, CC Docket No. 97-250 (July 1, 1998). See also MCI Opposition to SBC Petition for Reconsideration (filed July 14, 1998) ("MCI Opp."); and Reply of SBC Communications (filed July 24, 1998) ("Reply").

<sup>2</sup>In the Matter of Tariffs Implementing Access Charge Reform, CC Docket No. 97-250, Memorandum Opinion & Order (rel. June 1, 1998).

implied by the [June 1 Order].” Reply at 5 n.9 (emphasis added); see also id. at 6 (“a formal definition has not yet been adopted by the Commission”). Furthermore, SBC’s concession is plainly correct because no definition of non-primary lines appears in the June 1 Order. Indeed, the task of promulgating a new definition was expressly reserved for a separate proceeding. June 1 Order, ¶¶ 32, 38.

Second, far from promulgating a new definition of non-primary lines, the Commission’s June 1 Order merely determined that the definition used by the SBC Companies in their 1998 access reform tariff filings was unreasonable, and that Pacific Bell’s reported line count percentages also were unreasonable. June 1 Order, ¶¶ 25, 33, 37-38. In so doing, the Commission simply enforced its previous orders, which required SBC to develop, and Pacific Bell to apply, a reasonable definition of non-primary lines. The Commission was thus engaged in classic adjudication, not rulemaking, and acted within its well-established authority to prescribe just and reasonable rates in the context of a tariff investigation. See 47 U.S.C. § 205.

Third, because the Commission engaged in adjudication when it determined that SBC’s definition of non-primary lines, and Pacific Bell’s application of that definition, were unreasonable, SBC’s discussion of “retroactive” rulemaking is wholly irrelevant. As the courts have long-recognized, “retroactive application of new principles in adjudicatory proceedings is the rule, not the exception.” Molina v. I.N.S., 981 F.2d 14 (1st Cir. 1992) (emphasis added); see also Bowen v. Georgetown Univ. Hosp., 488 U.S. 204, 288 (1998) (Scalia, J., concurring).

SBC also argues that it was denied “due process” because it was not afforded an opportunity to respond to evidence placed into the record on May 27, 1998. Pet. at 4-5. This attempt to discredit the evidence on which the Commission relied is misguided. SBC was on notice, as early as May 16, 1997, that it would be required to use a reasonable definition of non-primary lines in its 1998 access reform tariff filings, and thus had ample opportunity to persuade the Commission that its proposed definition was reasonable.<sup>3</sup> Furthermore, with respect to the materials filed on May 27, 1998, SBC was afforded due process because it was given an opportunity to file its petition for reconsideration. See 47 C.F.R. § 1.106. Despite taking advantage of this opportunity, however, SBC has failed to present a meaningful challenge to the Commission’s determinations in the June 1 Order.

SBC’s related contention that the evidence on which the Commission relied is “irrelevant” is similarly misguided. See Pet. at 6-8. As an initial matter, the Commission undertook an extensive investigation of the non-primary line issue. The Commission’s staff used two studies, the Additional Line Study and Excess

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<sup>3</sup>First Report and Order, In the Matter of Access Charge Reform, No. 96-262, ¶ 83 (rel. May 16, 1997) (“Access Reform Order”); see also Order Designating Issues for Investigation and Order on Reconsideration, Tariffs Implementing Access Charge Reform, No. 97-250, ¶¶ 13-17 (rel. Jan. 28, 1998) (“Designation Order”).

Residential Loop Study, for estimating additional line penetration. June 1 Order, ¶ 15. The Commission also relied on surveys conducted by an economic research and consulting firm, and used financial institution reports concerning price cap LEC additional line penetrations. Id. at ¶¶ 16, 18, 22. The Commission also examined public statements made by price cap LECs concerning additional line penetrations, id. at ¶¶ 11, 25, and tested the Additional Line Study sampling data to determine whether it was representative of the price cap LECs' total residential line counts, id. at ¶ 18 n.36. The results of these surveys were determined to be statistically significant, representative of the population, and valid.

Against this impressive mountain of evidence, SBC can assert only that some unidentified number of facilities may not have had "working number[s]," that some unidentified number of reported households may have contained "multiple family units," and that the studies produced by Merrill Lynch and Salomon Brothers were "estimates" not "facts." Pet. at 6-8. Even assuming these assertions are true, they cast no doubt on the Commission's conclusions that SBC's definition was unreasonable<sup>4</sup> and that Pacific Bell's application of that definition produced a non-primary line count that was well outside the range of reasonable outcomes. The Commission based its decision on a wide array of relevant sources and, if anything, offered a prescription that is too favorable to SBC. See MCI Opp. at 4.

SBC also attempts to concoct a procedural argument under the Paperwork Reduction Act of 1995, Pub. L. No. 104-13, by arguing that the June 1 Order "improperly require[d] a new information collection" without first obtaining OMB approval. Pet. at 11-12. This argument is meritless, because the June 1 Order does not impose an information collection requirement on Pacific Bell. The Commission has merely required Pacific Bell to make refunds to IXCs; indeed, the order specifically forbids Pacific Bell from actually implementing a new primary line definition for the purpose of raising non-primary residential SLCs and recouping

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<sup>4</sup>Furthermore, the Commission only used statistical evidence to determine the reasonableness of Pacific Bell's non-primary line counts. The Commission did not rely on statistical evidence when it determined that SBC's definition of a non-primary line was unreasonable, but instead reached this conclusion due to the fact that SBC's approach "fail[ed] to identify additional residential lines even when the lines are billed to the same name and location." Id. ¶ 39.

undercharges from end-users. June 1 Order, ¶ 179. Calculating this refund does not require Pacific Bell to perform any "information collection" within the meaning of the Paperwork Reduction Act, and therefore OMB approval was not required.<sup>5</sup>

SBC ultimately is reduced to reasserting and rehashing the claim that its definition of non-primary lines, and Pacific Bell's implementation of that definition, are reasonable. SBC's renewed efforts, however, are unavailing. First, SBC defends its "pure account" definition by claiming that it is conducive to consumer choice. Pet. at 9. The Commission properly rejected this self-serving attempt to protect "gaming" and to short circuit the Commission's Access Reform Order by charging IXCs inflated rates:

If . . . subscribers with multiple lines at the same location are not encouraged to consolidate those lines on to a single account, the "pure account" definition and methodology is patently unreasonable because it fails to identify additional residential lines even when the lines are billed to the same name and location.

June 1 Order, ¶ 38. Second, SBC alleges that Pacific's reported line counts percentage (2.67%) must be deemed reasonable because the Commission did not find that Citizens' reported percentage (3.04%) was unreasonable. SBC overlooks the fact that the Commission's determination with respect to Citizens was based on the fact that the Commission "lack[ed] sufficient surrogate data" on which to make a finding of unreasonableness. June 1 Order, ¶ 28. Finally, SBC alleges that the inclusion of Lifeline customers in the calculation of total residential lines "unfairly skews Pacific Bell's percentage lower." Pet. at 7. Contrary to SBC's allegation, Lifeline customers should be included in this calculation "because they are residential lines that require interstate access, are used in the formulation of access charges, and were not included in the direct case residential line counts." June 1 Order, ¶ 13.

Nor can SBC successfully claim that IXCs should be denied the refund imposed by the Commission. See Pet. at 10-11; June 1 Order, ¶ 179. The prescriptive refund is appropriate given the unreasonableness of SBC's definition and

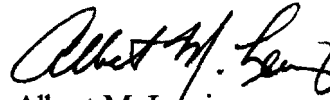
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<sup>5</sup>Even if it could be argued that the Commission has required Pacific Bell to undertake an information collection, those requirements could stem only from the original Access Reform Order and the Designation Order, not the June 1 Order. The Access Reform Order placed Pacific Bell on notice that it would have to develop and apply a reasonable definition of non-primary lines for its 1998 access reform tariff filings, Access Reform Order, ¶ 83, and the OMB expressly approved all of the Commission information collection requirements in that order, id. at ¶ 441. Moreover, the Designation Order expressly required all price cap LECs, including Pacific Bell, to develop, defend, and apply a reasonable definition of non-primary lines, see Designation Order, ¶¶ 13-17, 107, and the OMB issued the necessary approvals for that order as well. Notice of Office of Management and Budget Action, OMB No. 3060-0760 (January 29, 1998).

Pacific Bell's inflated IXC rates.<sup>6</sup> As MCI demonstrates, MCI Opp. at 6-7, even though SBC's errors caused IXCs to be billed for fewer non-primary line PICCs, any savings were more than offset by other rates that were substantially inflated, such as the multiline business PICC. The net result was an IXC overcharge of at least \$8.7 million. Id.

For the reasons stated above, the Commission should affirm its decision in the June 1 Order and deny SBC's Petition for Reconsideration.

Respectfully submitted,



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<sup>6</sup>See 47 U.S.C. § 205.